

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRAVELERS CASUALTY AND
SURETY COMPANY,

Plaintiff,

vs.

WASHINGTON TRUST BANK,

Defendant/Third-Party
Plaintiff,

vs.

SKILS' KIN, INC.,

Third-Party Defendant.

No. CV-13-0409-JLQ

ORDER RE: SKILS' KIN'S
MOTION TO DISMISS THIRD
PARTY COMPLAINT

BEFORE THE COURT is Third-Party Defendant Skils' Kin's Motion to Dismiss Third-Party Complaint. (ECF No. 40). Washington Trust Bank ("Bank") has filed a Response and Skils' Kin a Reply. (ECF No. 48 & 53). Oral argument was held on August 28, 2014. No one appeared for Plaintiff Travelers Casualty and Surety ("Travelers"). Leslie Weatherhead participated on behalf of Bank. Raymond Clary appeared for Third-Party Defendant, Skils' Kin, Inc. This Order memorializes and supplements the court's oral ruling.

I. Introduction/Procedural History

Plaintiff Travelers filed this suit against Bank as the "assignee and subrogee" of Skils' Kin. (Complaint, ECF No. 1). Travelers alleges that Bank, in disregard of reasonable commercial standards, cashed checks for Shannon Patterson, an employee of Skils' Kin, even though she was not a named payee and that this led to losses exceeding

1 \$500,000.00. Travelers has since filed a First and Second Amended Complaint (ECF No.
2 42), in which the basic factual allegations remain the same. Travelers contends that
3 Skils'Kin submitted a claim, that Travelers paid the claim, and "Skils'Kin assigned
4 certain claims to Travelers." (ECF No. 42, ¶ 17). Travelers also pleads that "because
5 Travelers paid Skils'Kin's insurance claim, Travelers is subrogated to Skils'Kin's
6 claims." (*Id.*).

7 In Bank's Answer to the First Amended Complaint (ECF No. 28) it asserted a
8 Counterclaim against Skils'Kin. Travelers moved to strike the Counterclaim, and in its
9 Motion argued that a Counterclaim can only be asserted against an opposing party and
10 Skils'Kin was not a named Plaintiff. (ECF No. 29). In ruling on the Motion to Strike, this
11 court stated: "Skils'Kin is not currently a party to this action, and thus Bank's claim
12 should have been denominated a third-party claim and brought pursuant to Fed.R.Civ.P.
13 14." (ECF No. 32, p. 3). Bank then filed a Third Party Complaint against Skils'Kin (ECF
14 No. 34) and Skils'Kin has now filed a Motion to Dismiss (ECF No. 48).

15 II. Discussion

16 Neither party directs the court to controlling authority on the precise issue of
17 whether a defendant [in this case, Bank], being sued by an assignee/subrogee plaintiff
18 [Travelers], may bring a third-party complaint against the subrogor [Skils'Kin].
19 Skils'Kin argues that "persuasive authority demonstrates [Bank's] failure to state a
20 claim". (ECF No. 40, p. 7). Skils'Kin cites to United States District Court opinions from
21 Pennsylvania and New Jersey. Bank relies primarily on state law cases - - from New
22 York and Connecticut.

23 Under subrogation, "once the insurer has paid a claim to the insured, it may then
24 stand in the shoes of the insured and assert the insured's rights against the tortfeasor."
25 *Wausau Underwriters Ins. v. Shisler*, 1999 WL 529250 (E.D.Pa. 1999). Here, the insurer,
26 Travelers, states that it has paid the insured, Skils'Kin, and may now assert Skils'Kin's
27 claims against Bank. Under subrogation, "the insurer is subject to any defenses which

1 the third-party has against the insured.” *Id.* at *3. Under this rationale, the court in
2 *Wausau* refused to allow a third-party complaint against a subrogor because any claim
3 “would merely serve to eliminate or reduce [subrogee’s] recovery from [defendant].” *Id.*
4 at *4. The District Court in *USAA Casualty Ins. Co. v. Metropolitan Edison Co.*, 2013
5 WL 2403309 (M.D. Pa. 2013) reached the same conclusion.

6 In *American Fire and Casualty Co. v. Material Handling Supply, Inc.*, 2007 WL
7 1296200 (D.N.J. 2007), the court stated that it could not find a New Jersey case “that
8 addresses the issue of whether a defendant in a subrogation action can join the plaintiff’s
9 insureds/subrogors as third-party defendants.” *Id.* at *2. However, the court observed:
10 “It is well-settled that a subrogee is subject to all legal and equitable defenses that the
11 alleged tortfeasor may have against it or against its insured.” *Id.* Therefore, the court
12 determined it would be futile to allow the joinder of the subrogor.

13 In the cases relied upon by Bank, the courts have allowed the third-party claim
14 against the subrogor, where the third-party claim may exceed the original Plaintiff’s
15 claim. In *Peerless Ins. Co. v. Beshara*, 75 A.D.3d 733 (N.Y.App. 2010), the court stated
16 that the subrogee succeeded to the benefits of the subrogor, but was also chargeable for
17 the liabilities. Therefore, defendant could counterclaim against the subrogee without
18 bringing a third-party complaint against the subrogor. However, the counterclaim could
19 only set-off plaintiff’s claim, and if the defendant wanted to seek affirmative relief
20 against the subrogor, then a third-party claim would be appropriate.

21 Similarly, in *Middlesex Mut. Assur. Co. v. Black*, 40 Conn.Supp. 63 (Super. Ct.
22 1984), the court found that a defendant could assert a third-party claim against a subrogor
23 that exceeded the claims in the complaint if the claims arose out of the same transaction
24 or occurrence. In that case, Licamele, the subrogor, owned a home in which there was
25 a fire. Middlesex, the insurer and subrogee, paid the claim and became subrogated to
26 Licamele’s rights against Black. The fire had allegedly begun in Black’s apartment, and
27 Middlesex sued Black for negligence. Black filed a third-party complaint alleging that

1 the negligence of Licamele had caused the fire. The court found no Connecticut authority
2 on point, and looked to Fed.R.Civ.P. 14 and 18 for guidance. The court denied the
3 motion to strike the third-party complaint, and stated that where “the third party
4 defendant has been properly impleaded, and where all claims made by Black, the third
5 party plaintiff, arise out of the same transaction complained of in the original complaint,
6 the third party complaint may include claims for damages in excess of those sought in the
7 original complaint.” *Id.* at 66.

8 Herein, the Bank has asserted affirmative defenses against Travelers. (ECF No. 47,
9 Answer to Second Amended Complaint with Affirmative Defenses). Bank has
10 specifically pled that Travelers is “subject to all defenses and setoffs available against
11 Skils’Kin” (ECF No. 47, p. 5), and the court agrees. Bank has raised by affirmative
12 defense the alleged failure of Skils’Kin to timely inspect its statements. At oral
13 argument, Bank stated that in filing the third-party claim against Skils’Kin it sought to
14 preserve its claim for breach of presentment warranty. That claim, to the extent it arises
15 from the same transactions and occurrences described in Traveler’s Second Amended
16 Complaint, can be pursued against Travelers because Travelers, as the assignee and
17 subrogee, is subject to the same defenses and liabilities as Skils’Kin.

18 Bank, in answering the Amended Complaint, asserted a Counterclaim against
19 Skils’Kin, who at that time was not a named party. That Counterclaim (ECF No. 28)
20 asserts the same or similar issues as the affirmative defenses—that Skils’Kin did not
21 promptly examine statements, that Bank is entitled to an award of attorney fees as the
22 prevailing party, and that Shannon Patterson represented and warranted she was entitled
23 to enforce the checks. Therefore, Travelers is clearly on notice of Bank’s claims and
24 defenses. The procedural wrangling that has ensued could have been avoided had
25 Travelers responded to the initial Counterclaim against Skils’Kin by stating that the
26 Counterclaim should be denominated against Travelers as the assignee and subrogee.
27 Instead, the technical defense that Skils’Kin was not named, and could not be subject to

1 counterclaim, was raised.

2 **III. Conclusion**

3 The Third-Party Complaint (ECF No. 34) alleges that “Skils’Kin is liable to
4 Washington Trust Bank for any loss that accrues to Washington Trust Bank in Travelers’
5 action from Skils’Kin’s failure to examine its statements...” (§ 8). It further states that
6 Skils’Kin is “liable to Washington Trust Bank for reimbursement of any amounts
7 Washington Trust Bank is required to pay in connection with the checks.” (ECF No. 34,
8 ¶ 11). Again at Paragraph 13, Bank asserts that Skils’Kin is liable to Bank for “any
9 amounts [Bank] is held liable....”. Bank’s Third-Party Complaint seeks to hold Skils’Kin,
10 the subrogor, liable for any amounts that Bank is ordered to pay to Travelers, the
11 subrogee.

12 Bank’s arguments against Skils’Kin have been adequately raised in the pleadings
13 via affirmative defenses. These claims are properly asserted against Travelers, who
14 stands in the shoes of Skils’Kin and succeeds to the benefits of Skils’Kin, and is also
15 charged with the liabilities. Bank’s defenses against Skils’Kin are tied to the underlying
16 transactions described in the Second Amended Complaint and are at issue. They need
17 not be denominated as counter or third-party claims

18 **IT IS HEREBY ORDERED:**

19 Third-Party Defendant Skils’Kin’s Motion to Dismiss Third-Party Complaint (ECF
20 No. 40) is **GRANTED**.

21 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to
22 counsel.

23 Dated this 3rd day of September, 2014.

24 s/ Justin L. Quackenbush
25 JUSTIN L. QUACKENBUSH
26 SENIOR UNITED STATES DISTRICT JUDGE
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